No. 92-97

In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., ET AL.,
Petitioners

v.

COUNTY OF KENT, MICHIGAN, ET AL.
Respondents

**On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

We will address the following questions:

1. Whether the Anti-Head-Tax Act, 49 U.S.C. App. § 1513(b), contains the manifestation of unambiguous congressional intent necessary to authorize the States to discriminate against or unreasonably burden interstate commerce through assessments that otherwise would violate the Commerce Clause.

2. Whether transportation facility user fees that have the practical effect of shifting a disproportionate amount of costs to interstate users from intrastate users violate the Commerce Clause.

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INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. ("ATA"), is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of interstate for-hire carriers, private carriers, and leasing companies.

The interstate trucking industry is traditionally one of the principal targets of discriminatory state taxation and regulation. As a result, ATA and its members have brought or participated in Commerce Clause challenges to a wide range of state taxes, fees, and regulations before this Court and

other state and federal courts. *E.g.*, *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992); *Dennis* v. *Higgins*, 498 U.S. 439 (1991); *American Trucking Associations, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *Commonwealth of Kentucky Transportation Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988).

Because highway users are subject to substantial federal regulation, states frequently defend undue burdens on interstate transportation – most recently, restrictions on the interstate transportation of wastes – by claiming that a particular restriction was authorized by a federal statute. *E.g.*, *Chemical Waste Management, Inc.* v. *Templet*, 967 F.2d 1058 (5th Cir. 1992), cert. denied, 113 S. Ct. 1048 (1993); *Hazardous Waste Treatment Council* v. *South Carolina*, 945 F.2d 781 (4th Cir. 1991); *National Solid Wastes Management Association* v. *Alabama Department of Environment*, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001 (11th Cir. 1991). ATA accordingly has a strong interest in the issues presented in this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief we address the Sixth Circuit's decision that the Airlines were foreclosed from asserting the Commerce Clause component[2] of their challenge to a system of fees imposed on users of the Kent County International Airport

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

[2] The Airlines also claimed that the user fees violated the Anti-Head-Tax Act, 49 U.S.C. App. § 1513, the Airport and Airway Improvement Act, 49 U.S.C. App. § 2210, and state law.

near Grand Rapids, Michigan.[3] The court of appeals held that a subsection of the Anti-Head-Tax Act, 49 U.S.C. App. § 1513(b), overrode the constraints imposed by the Commerce Clause upon the States. Section 1513(b) states: "[N]othing in this section shall prohibit a State * * * owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

The Sixth Circuit's decision disregards the plain language of Section 1513(b), which explicitly confines the insulating effect of that subsection to the prohibitions in Section 1513(a). The legislative history, and this Court's interpretations of similarly worded statutes, only confirm the obvious meaning of the words "nothing in this section shall prohibit": Section 1513(b) exempts "reasonable" airport user fees from the Anti-Head-Tax Act, not from the Commerce Clause. The Sixth Circuit's holding is still more difficult to fathom when Section 1513(b) is compared to the statutes in which this Court has found congressional authorization for Commerce Clause violations. Each of those statutes reflected an affirmative delegation of new power to the States, not a mere limitation of the scope of a federal statutory prohibition.

The stated rationale of the court of appeals is astonishingly broad, foreclosing judicial review under the Commerce Clause of state taxes and regulations whenever Congress has "taken [any] action to regulate the area" of commerce at issue. 955 F.2d at 1063. The Sixth Circuit thus would not only transform every savings clause into an authorization to burden interstate commerce, but would infer such an authorization from every federal regulatory scheme to the extent that state power was recognized but not wholly preempted.

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[3] We refer to the respondents, Kent County, the Kent County Department of Aeronautics, and the Kent County Board of Aeronautics, as the "Airport."

Finally, in the event the Court takes the occasion to decide the Commerce Clause issue and to clarify the proper standards to guide Commerce Clause evaluation of user fees for transportation facilities, we urge it to remain steadfast in its rejection of fee structures or taxing schemes that shift the tax burden to out-of-state businesses by systems of exemptions or classifications.

ARGUMENT

I. CONGRESS HAS NOT AUTHORIZED THE STATES TO IMPOSE AIRPORT TAXES OR USER FEES THAT OTHERWISE WOULD VIOLATE THE COMMERCE CLAUSE

This Court repeatedly has held that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve * * * a violation of the Commerce Clause." *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 802 (1992); see also *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986); *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 90-92 (1984); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982).

In "most * * * cases" this Court has "looked for an express statement of congressional policy." *Wunnicke*, 467 U.S. at 90. Although "[t]here is no talismanic significance to the phrase 'expressly stated,'" the Court does "require[ ] that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *Id.* at 91. Accordingly, the Court has found approval for otherwise impermissible state action only in the rare cases in which a State adduces "persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Sporhase*, 458 U.S. at 960.

The Sixth Circuit professed to find the requisite "clear and unambiguous intent" in the Anti-Head-Tax Act, which provides, in pertinent part:

> (a) No State (or political subdivision thereof * * *) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom * * * .
>
> (b) [N]othing in this section shall prohibit a State (or political subdivision thereof * * *) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof * * *) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C. App. § 1513. The statutory language indisputably reflects an intent that the Anti-Head-Tax Act itself not work an outright prohibition on "reasonable" airport rental charges and user fees; but it hardly follows from this that Congress intended to "extend to the States new powers * * * that they would not have possessed absent the federal legislation." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980). The alternative propositions that the Airport and Airway Improvement Act, 49 U.S.C. App. § 2210, or the Federal Aviation Act as a whole, 49 U.S.C. App. §§ 1301 *et seq.*, somehow silently supplant the restrictions of the Commerce Clause are also entirely without merit.

A. Section 1513(b) Does Not Evince Clear and Unambiguous Congressional Intent to Supplant the Commerce Clause.

1. *By Its Plain Meaning, Section 1513(b) Limits The Preemptive Effect Of Section 1513(a), But Does Not Override The Limitations On State Power That Flow From The Commerce Clause.*

a. Section 1513(b) by its express terms protects state fees and charges only against challenge under the Anti-Head-Tax Act: "nothing *in this section*" (emphasis added) – that is, in the Act itself – "shall prohibit a State" from imposing certain identified types of taxes or fees that are "reasonable." Not one word of Section 1513(b) purports to do anything other than limit the reach of the prohibition contained in Section 1513(a).

The syntax of Section 1513(b) is as plain as the vocabulary of those first four words. For one thing, the phrase "nothing in this section shall prohibit" is not the language of "positive expression" (*Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946)), or of "affirmative[ ] permi[ssion]" (*White* v. *Massachusetts Council of Construction Employees*, 460 U.S. 204, 213 (1983)), or even of "affirmative[ ] contemplat[ion] of otherwise invalid state legislation" (*Wunnicke*, 467 U.S. at 91-92). In fact there is nothing "positive" or "affirmative" in that language at all.

Surely no one would seriously contend that, if some other, separate federal statute restricted in some manner the States' ability to impose user fees on aircraft operators, that restriction would be overridden by Section 1513(b). Still less convincing is the proposition that Section 1513(b)'s exemption from the effect of Section 1513(a) excuses *constitutional* violations. Yet that is precisely the argument made by the Airport, and accepted by the Sixth Circuit.

The Sixth Circuit apparently believed that the requisite congressional authorization might be found in the word "reasonable."[4] But "reasonable" fees are insulated only against the effect of Section 1513(a). The latter provision prohibits a broad range of taxes, fees, and "other charge[s]" levied "directly or indirectly" on "persons traveling in air commerce," on the "carriage" of those persons, "on the sale of air transportation," or "on the gross receipts therefrom." Any charge or fee imposed on commercial "aircraft operators" ultimately is paid by "persons traveling in air commerce" and amounts to an assessment on the "carriage" of those persons. Without the exemption in Section 1513(b), many charges there described might be deemed to have been preempted by the preceding subsection of the Act; certainly much avoidable litigation would have ensued. Yet to exempt *all* "rental charges, landing fees, and other service charges" on "aircraft operators" would nullify the prohibition on head taxes. Any government that owned or operated an airport could simply redesign its head tax as a "service charge" or "landing fee" that would return revenues roughly in proportion to the number of passengers carried by an airline.

By placing a limit on the exemption in the second clause, the word "reasonable" makes clear that the prohibitions in Section 1513(a) take precedence in case of an overlap, and thus helps to preserve the internal consistency of Section 1513. Cf. *New England Legal Foundation* v. *Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir. 1989) (equating finding that landing fee was "reasonable" under § 1513(b)

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[4] The same logic would lead to the absurd conclusion that the federal requirement that States allow commercial motor vehicles "reasonable access" between the national highway network and truck terminals and facilities for food, fuel, repairs and rest, 49 U.S.C. App. § 2312, itself authorizes the collection of discriminatory access fees from out-of-state truckers, so long as the access remains "reasonable" under the statute.

with finding that fee was not "a head tax or its equivalent" and thus was not preempted by § 1513(a)). It scarcely would be "reasonable," given the broad prohibitions in Section 1513(a), to levy a fee that imposed a head tax under a different name.

In sum, the Anti-Head-Tax Act reflects a carefully circumscribed withdrawal of power from the States. The Act preempts a narrow category of state assessments on air commerce: head taxes and the like. Yet "nothing in this section" alters the States' power to set landing fees and other user charges. That exemption, in turn, is limited to "reasonable" fees and charges. But no part of the statutory language can be read to *expand* state taxing authority by authorizing the imposition of discriminatory or unreasonably burdensome levies on interstate business.[5]

b. This Court has often considered statutory provisions that are phrased similarly to Section 1513, providing that nothing in a particular statute prohibits a State from exercising a particular type of authority. The Court has never read

[5] The general policy of the Anti-Head-Tax Act was to *supplement* the constitutional *restrictions* on state assessments upon interstate airport activity. The Act was passed in direct response to *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. 707 (1972), in which the Court held that the Commerce Clause did *not* invalidate a head tax levied on airline passengers. See *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 9-10 (1983). The very *raison d'être* of the Act was to "prohibit[ ]" the "new, inequitable, and potentially chaotic burden" of the head taxes otherwise permitted by the Commerce Clause. S. Rep. No. 12, 93d Cong., 1st Sess. 17, reprinted in 1973 U.S.C.C.A.N. 1434, 1446. Clearly Congress thought that the Commerce Clause allowed the states too much power, not too little, and the Senate committee said so in no uncertain terms: "[T]he Court decision [in *Evansville*] does not provide adequate safeguards to prevent undue or discriminatory taxation." *Ibid.*

such language to indicate a congressional intent to allow the States to act in a manner that would otherwise violate the Commerce Clause. On the contrary, this Court well recognizes the formulation "as a standard 'non-preemption' clause." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982). The Court has held repeatedly that an expression of congressional intent not to preempt state action through adjacent positive legislation is not at all the same thing as "unmistakably clear" intent to authorize state action that otherwise would violate the Commerce Clause.

In *New England Power*, New Hampshire claimed that its ban on the export of hydroelectric power was authorized by a Federal Power Act section that provided that the Act "*shall not . . . deprive* a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy." 455 U.S. at 341 (quoting 16 U.S.C. § 824(b)(1)) (emphasis added). Although (in the words of the Sixth Circuit in this case) the federal government undeniably had "taken" considerable "action to regulate" hydroelectric power, the Court held that "this provision is in no sense an affirmative grant of power to the states to burden interstate commerce in a manner which would otherwise not be permissible." *Ibid.* (internal quotation marks omitted). Rather, the statutory language evinced only an intent that the Act not *reduce* states' power. See also *Wyoming* v. *Oklahoma*, 112 S. Ct. at 802.

Similarly, the Court held that a clause that provided that a federal law "*shall not be construed as preventing* any State from exercising such powers and jurisdiction which it now has or may hereafter have" over banks (12 U.S.C. § 1846 (emphasis added)) merely "define[d] the extent of the federal legislation's pre-emptive effect on state law." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980). The statutory language did not "support the contention that it also was intended to extend to the States new powers * * * that they would not have possessed absent the federal legislation,"

but rather "applie[d] only to state legislation that operates within the boundaries marked by the Commerce Clause." *Ibid.* And in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), the Court held that statutory language providing that "*nothing in this Act shall be construed as affecting * * * or to in any way interfere* with the laws of any State * * * relating to * * * water used in irrigation" – a provision worded, if anything, more broadly than Section 1513(b) – merely "defines the extent of the federal legislation's pre-emptive effect on state law." *Id.* at 959 (emphasis added). When "such language" excepts from preemption a certain segment of state law, "[t]he negative implications of the Commerce Clause * * * are ingredients of the *valid* state law to which Congress has deferred." See *id.* at 959-960.

The resemblance between the wording at issue in these cases and that in Section 1513 need not stand on its own footing. In another context, this Court already has placed Section 1513(b) firmly in the line of standard non-preemption clauses. In *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 12 n.6 (1983), the Court explained that Section 1513(a) "pre-empts a limited number of state taxes," while Section 1513(b) "clarifies Congress' view that the States are still free to impose [other assessments] on airlines and air carriers." The first clause of Section 1513(b), like the second clause at issue in this case, begins, "Nothing in this section shall prohibit * * * ." The Court interpreted the first clause as an "exemption" by which certain property taxes may "escape preemption." 464 U.S. at 13. The second clause surely is nothing more.[6]

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[6] The Court again examined the preemptive force of Section 1513 in *Wardair Canada, Inc.* v. *Florida Department of Revenue*, 477 U.S. 1 (1986). It proceeded from a discussion of preemption to an analysis of the validity of a state statute under the Commerce Clause, albeit in that case the Foreign Commerce Clause was at

(continued...)

2. *Section 1513(b) Is Far Different From The Statutory Provisions That This Court Previously Has Held To Authorize Undue Burdens On Commerce.*

In determining whether Congress intended a statute to supplant the dormant Commerce Clause, this Court consistently demands evidence that the enacting Congress "affirmatively contemplate[d] otherwise invalid state legislation." *Wunnicke*, 467 U.S. at 91. We have shown above that, by contrast, in enacting Section 1513 Congress intended to *invalidate* otherwise *valid* state legislation, but not to *validate* otherwise *invalid* legislation.

The Court has declared its reluctance to find authorization to violate the Commerce Clause unless the "congressional intent and policy to insulate state legislation from Commerce Clause attack have been 'expressly stated.'" *Wunnicke*, 467 U.S. at 90 (quoting *Sporhase*, 458 U.S. at 960). Indeed, the Court has long recognized that only a "few unique federal statutes" indicate "consideration or desire to alter the limits of state power otherwise imposed by the Commerce Clause." *United States* v. *Public Utilities Commission*, 345 U.S. 295, 304 (1953).

Of the very few statutes that have satisfied the Court that Congress did intend to alter those limits, some, like the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1012), explicitly refer to the dormant commerce power: "The business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business," and "silence on the part of the Congress shall not

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[6] (...continued)
issue. *Id.* at 7-13. Chief Justice Burger did not persuade a single colleague to join his concurring view that Section 1513(b) displaced Commerce Clause analysis by authorizing the taxes at issue. *Id.* at 13-17.

be construed to impose any barrier to the regulation or taxation of such business by the several States." Almost all the rest involve an affirmative statement in the statutory language to the effect that the States "may" do something that on its face would violate the Commerce Clause. *E.g.*, *New York* v. *United States*, 112 S. Ct. 2408, 2425 (1992) (42 U.S.C. § 2021e(d)(1), stating that waste disposal fees that discriminate by State of origin "may be charged," clearly "authorize[s] the States to burden interstate commerce"). Indeed, as late as 1982 – nine years after the enactment of the Anti-Head-Tax Act – this Court noted that it had theretofore consistently held that "Congress consented to the unilateral imposition [by States] of unreasonable burdens on commerce" *only* when the congressional "intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated." *Sporhase*, 458 U.S. at 960 (internal quotation marks omitted).

In only two instances has this Court been willing to infer authorization from less forthright statutory language. In both cases, however, the language and legislative history of the statute made clear Congress's intent to authorize the States to exceed the limitations on their authority imposed by the Commerce Clause.

In *White* v. *Massachusetts Council of Construction Employees*, 460 U.S. 204, 213 (1983), the Court held that Congress authorized cities that received federal development grants to discriminate in favor of their own residents when hiring workers for construction projects funded with those grants. This ruling relied substantially on the fact that "federal regulations * * * affirmatively permit[ted] the type of parochial favoritism" challenged in that case. *Id.* at 213. Indeed the regulations not only permitted, but in fact specifically compelled local governments to use federal construction grants to employ and train persons residing in the local area "to the greatest extent feasible." *Id.* at 213 n.11. Thus the discrimination in *White* flowed from the local government's

obedience to an explicit federal policy that had been promulgated by an agency in the executive branch pursuant to authority delegated by Congress. By contrast, no federal rule or law compels or even "affirmatively permit[s]" airport user fee schemes that discriminate against or unreasonably burden interstate commerce. Cf. 49 U.S.C. § 11506 (authorizing Interstate Commerce Commission to promulgate standard for state motor carrier fees, and providing that any similar fee not in accordance with ICC standard "shall be deemed to be a burden on interstate commerce.")

The second instance in which this Court inferred congressional authorization through something other than express statutory language involved a truly "unique federal statute." In *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.*, forbade the Federal Reserve Board to approve any application by a bank in one state to acquire a bank in another state unless the acquisition was "specifically authorized by the statute laws" of the home State of the acquired bank. *Id.* at 168 (quoting 12 U.S.C. § 1842(d)). The state statute at issue in *Northeast Bancorp* authorized such acquisitions only by banks in nearby states with which the home State had a reciprocal agreement.

Although the federal statutory language did not expressly authorize a home State to discriminate among other States, this Court upheld the Board's approval and the underlying state statute. The Court relied primarily on the legislative history of the Holding Company Act (472 U.S. at 169-173), which indicated that the amendment was intended to serve "policies of community control and local responsiveness of banks." *Id.* at 169. Congress had approved of similar types of regional discrimination in state regulation of intrastate banking, and specifically intended "to allow each State flexibility in its approach" to the permission or prohibition of interstate banks. *Id.* at 171.

As we have explained above, the legislative context of the Anti-Head-Tax Act is entirely different. No comparable policy of encouraging local control or accommodating state experimentation underlies Congress's negative reaction to the proliferation of airport head taxes. Rather, the Anti-Head-Tax Act outlawed certain state-imposed burdens on commerce despite a clear holding of this Court that they were permissible under the Commerce Clause.

3. The Sixth Circuit's Standard For Inferring Congressional Authorization Is Sharply Inconsistent With This Court's Precedents.

The Sixth Circuit did not measure the Anti-Head-Tax Act against this Court's consistent requirement that Congress "manifest its unambiguous intent before a federal statute will be read to permit or to approve * * * a violation of the Commerce Clause." *Wyoming* v. *Oklahoma*, 112 S. Ct. at 802. Instead, the court of appeals declared that the Commerce Clause limits the ability of the states to tax or regulate interstate commerce *only* "if Congress ha[s] taken *no other action* to regulate the area." 955 F.2d at 1063 (emphasis added). The Sixth Circuit (*ibid.*) and the United States (in its amicus brief at 18) rely on *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), for this novel approach. That reliance is utterly misplaced.

The question in *Merrion* was whether a severance tax enacted by an Indian tribe violated the Commerce Clause. Although the Court doubted that the Commerce Clause applied to the ordinances of a sovereign Indian tribe under any circumstances, 455 U.S. at 153-154, it proceeded to analyze the legislative background of the tax.

Congress had "affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect." 455 U.S. at 155. First, a tribe could not "adopt[ ] or revise[ ] its constitution to announce its intention to tax nonmembers" until it obtained the approval of the

Secretary of the Interior. *Ibid.* Second, "before the ordinance imposing the * * * tax challenged [in *Merrion*] could take effect, the Tribe was required again to obtain approval from the Secretary." *Ibid.* Thus, a federal agency acting pursuant to congressionally delegated authority issued the decision that put the challenged tax in force. The tax not only bore a federal imprimatur, like the statute in *Northeast Bancorp*, but indeed amounted to a federal legislative act.

In finding that the tax in *Merrion* was not subject to Commerce Clause review, this Court pointedly distinguished state and local taxes like the one at issue in the present case. The Court stressed that the tribal tax was "in a posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce." *Id.* at 155-156. By contrast, judicial review of the tribal tax "would duplicate the administrative review called for by the congressional scheme." *Id.* at 156.

In the present case – as in the typical case – the "challenged state tax * * * does not need specific federal approval to take effect." And therefore it most certainly *does* require "judicial review to ensure that it does not unduly burden or discriminate against interstate commerce." This Court's subsequent cases uniformly have recognized that *Merrion* did not abolish the requirement that Congress clearly express its unambiguous intent to authorize Commerce Clause violations, even when federal legislation touched upon the same subject matter as a state regulation. *Wyoming* v. *Oklahoma*, 112 S. Ct. at 802; *Maine* v. *Taylor*, 477 U.S. at 138-139.

A moment's reflection brings home the broad disruption of the federal-State balance that would ensue were this Court to adopt the Sixth Circuit's astonishingly inclusive standard for inferring congressional authorization of Commerce Clause

violations. Under this Court's precedents, it always has been clear that Congress could approve a scheme in which federal regulation could exist side by side with state regulation, without thereby automatically authorizing the States to violate the Commerce Clause. It was against this unchanging background that Congress passed the Anti-Head-Tax Act, as well as a plethora of other statutes that afforded the States some role in an area regulated in part by the federal government.

The implications of foreclosing Commerce Clause review of all state taxes and regulations whenever Congress has "taken * * * other action to regulate the area" are made explicit in the Acting Solicitor General's arguments opposing certiorari. In that amicus brief (at 18-19), the United States appears to equate every "exercise[ ] of [Congress's] Commerce Clause authority" with an "act" that has "struck the balance [Congress] deems appropriate." That view would exempt from Commerce Clause review all state activity that is related to hundreds, if not thousands, of federal statutes. Indeed, because it is the rare area of commerce that has not been touched by at least some federal regulation, that approach would eviscerate the Commerce Clause, even though Congress – acting in reliance on this Court's long-standing rule requiring an unambiguous manifestation of intent – intended no such thing.

Moreover, under the Acting Solicitor General's view, even statutes that simply prohibited certain actions might authorize the States to discriminate against or unduly burden interstate commerce. Section 1513(a) could stand alone as an authorization, on the theory that, by forbidding the actions enumerated in that subsection, Congress would be deemed to have "struck the balance it deems appropriate," necessarily exempting all other state impositions in the area from Commerce Clause review. Under this imaginative logic, a double negative could supply the "unmistakably clear" manifestation of "unambiguous intent" to permit a violation of the Commerce Clause. For example, a provision – contained within

a section explaining the preemption of state law – that reads, "A State * * * may not levy any fee in connection with the transportation of hazardous materials that is not equitable," 49 U.S.C. App. § 1811(b), would become a blanket authorization to discriminate against interstate commerce so long as the fees met some *ad hoc* test of "equity."

Even if this Court were to decide, a little more narrowly, that Congress silently supplants the Commerce Clause when it enacts a "comprehensive scheme of federal regulation and oversight," a host of statutes would become licenses for state discrimination against interstate commerce. The Federal Power Act surely imposes on hydroelectric power one of the more sweeping federal regulatory schemes, yet in *New England Power* this Court found that fact insufficient to support a conclusion that Congress had thereby displaced judicial Commerce Clause review; what is more, it held that a clause expressly reserving to the states their "lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line" did not license the States to violate the Commerce Clause. See 455 U.S. at 341-343; see also *Wyoming* v. *Oklahoma*, 112 S. Ct. at 802. And the Interstate Commerce Commission's regulations on truck safety did not stop the Court from subjecting to Commerce Clause review state standards that expressly were *not* preempted by the federal scheme. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 n.5 (1959) (referencing former 49 C.F.R. pts. 190-197).

In addition, despite the significant role afforded the States in the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and the Comprehensive Environmental Resource Conservation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, the lower courts have rejected attempts to transform those statutes into broad charters to burden interstate commerce. *E.g.*, *Chemical Waste Management, Inc.* v. *Templet*, 967 F.2d 1058 (5th Cir. 1992), cert. denied, 113 S. Ct. 1048 (1993); *Hazardous Waste Treatment Council* v. *South*

Carolina, 945 F.2d 781 (4th Cir. 1991); *National Solid Wastes Management Association* v. *Alabama Department of Environment*, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001 (11th Cir. 1991).[7] Those decisions would be cast into doubt, if not invalidated outright, were this Court to adopt the Sixth Circuit's expansive view of congressional authorization.

And, to turn to our area of concern, Congress extensively regulates both the highways and the interstate trucking industry. Federal legislation expressly requires the States to allow commercial motor vehicles up to a specified size "reasonable access" between designated highways and terminals and facilities for food, fuel, repairs, and rest. 49 U.S.C. App. § 2312. It scarcely could be argued that, by imposing the access requirement, Congress thereby authorized the States to take every other conceivable action to discriminate against or unreasonably burden interstate trucking. Yet that conclusion follows inevitably from the reasoning of the Sixth Circuit and the United States.

In short, under the Sixth Circuit's standard, every comprehensive federal regulatory scheme that countenances continued state power within the field – a popular legislative model indeed – would supplant the dormant Commerce Clause, providing the States with a license to tax and regulate irrespective of any adverse effects on interstate commerce

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[7] The Low Level Waste Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b *et seq.*, which added to a federal regulatory scheme clear authority to charge discriminatory disposal fees, would have been entirely unnecessary if the original Act, by "ced[ing] some regulatory authority to the states," had removed disposal of the referenced wastes from the protection of the Commerce Clause. *Washington State Building Trades Council* v. *Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) ("Congress stopped short of granting the states power to ban wastes transported from outside their borders"), cert. denied, 462 U.S. 913 (1983).

other than those prohibited by each particular regulatory scheme. Vast areas of commerce would be opened by judicial fiat – indeed, by judicial *volte-face* – to incursions by the States, to be judged only by a set of statutory standards that were never designed to protect interstate commerce (much less to remove the protections of judicial Commerce Clause review).

4. *If, Contrary to Our Submission, the Anti-Head-Tax Act Displaces the Commerce Clause, There is Nonetheless No Basis to Construe the Word "Reasonable" to Authorize Fees that Discriminate Against or Unreasonably Burden Interstate Commerce.*

Although the Sixth Circuit held that the standard of reasonableness under the Anti-Head-Tax Act was similar to the Commerce Clause standards set forth in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. 707 (1972), the court also held that under the Act it could evaluate the fees charged commercial aviation only in a vacuum, that is, irrespective of the treatment of other classes of users; it thus created a large loophole not present in normal Commerce Clause analysis. We submit that if the Anti-Head-Tax Act forecloses judicial review of state taxes and regulations under the Commerce Clause by its use of a standard of "reasonableness," that standard is properly interpreted to incorporate the principles of Commerce Clause analysis that prohibit discrimination against or undue burdens upon interstate commerce.

Simply put, there is not one word in the statute, or one shred of evidence in the legislative history, that Congress intended that a fee could be "reasonable" and thus permissible under the Anti-Head-Tax Act even though it would violate the dormant Commerce Clause. As we explained above, the Act clearly was a reaction to what Congress perceived as too permissive a reading of the Commerce Clause in *Evansville*.

What is more, the word "reasonable," like "equitable" or similar generalities, does not in itself indicate the slightest intent to trench upon the free trade area protected by the Commerce Clause. Rather, under their natural interpretation, such words require both compliance with the background constitutional principles embodied in the Commerce Clause and in addition fairness and rationality in any other applicable respects. Thus "reasonable" fees must pass muster under a "Commerce Clause plus" analysis that is *more stringent* than Commerce Clause analysis alone.

B. A Federal Statute Does Not, By Merely Addressing an Area of Commerce, Exempt All State Action in that Area from Commerce Clause Review.

The United States argued at the petition stage (Br. 19) that the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. §§ 2201 *et seq.* ("Improvement Act"), "explicitly and unambiguously *addressed the subject* of airport fees and rentals charged to all airport users" (emphasis added). The statutory section cited by the United States, 49 U.S.C. App. § 2210, does no more, however, than set out contractual commitments that the Secretary of Transportation must obtain from airport authorities as conditions precedent to the disbursement of federal airport development grants. That provision supplies no basis for inferring that Congress made a considered decision to remove state charges for airport use from the strictures of the Commerce Clause. See *Wunnicke*, 467 U.S. at 91.

If every federal *funding* statute exempted related state action from the Commerce Clause, few areas of commerce would remain protected by that erstwhile bulwark of a unified economy. First, a vast array of statutes aiding the States in one or another endeavor would also (quite without any intention to do so) authorize discrimination against interstate commerce within the funded activity. Even more striking

would be the treatment of state activities that could have been, but were not, funded: those activities would be subject neither to statutory restraints on the ability to discriminate against interstate commerce (because the unfunded activities would not be subject to any conditions placed upon funding), nor to constitutional restraints (because the funding statute would have "exercised" Congress's Commerce Clause power and thus displaced limitations imposed by the dormant Commerce Clause). See U.S. Br. at 18-19.

No more tenable is the United States' contention (Br. 18) that the protections of the Commerce Clause necessarily have been superseded by "the comprehensive scheme of federal regulation and oversight of the Nation's airways and airports," as reflected in the Federal Aviation Act, 49 U.S.C. App. §§ 1301 *et seq.*, the Improvement Act, and the Anti-Head-Tax Act. Indeed, the contention is directly contrary to the precedent of this Court. If a "comprehensive scheme of federal regulation and oversight" were enough to authorize a State to violate the Commerce Clause in any way not prohibited by the statutory scheme itself, then surely *New England Power*, *supra*, was wrongly decided. In that case the Court addressed a scheme of "federal regulation and oversight" at least as comprehensive as that for aviation. Yet, as the Court made crystal clear, complexity and comprehensiveness of a regulatory framework do not substitute for a clear manifestation of Congress's "intent and policy to sustain state legislation from attack under the Commerce Clause." *New England Power*, 455 U.S. at 343 (internal quotation marks omitted). No matter how extensive the federal regulation in an area, if Congress does not include a provision authorizing States to burden interstate commerce, the Court has "no authority to rewrite its legislation based on mere speculation as to what Congress probably had in mind." *Ibid.* (internal quotation marks omitted).

II. TRANSPORTATION FACILITY USER FEES THAT HAVE THE PRACTICAL EFFECT OF SHIFTING COSTS TO INTERSTATE USERS FROM IN-STATE USERS VIOLATE THE COMMERCE CLAUSE

The Airlines' Commerce Clause claim, as we understand it, is that the fee structure adopted by the Airport results in the imposition of discriminatory and excessive charges on interstate commerce. This assertion rests on two premises: that the fee structure shifts costs of airport operation from general aviation to commercial aviation; and that those two categories consist of materially different proportions of persons or businesses engaged in interstate, as opposed to local or intrastate, activities. Although this Court may prefer to remand the Commerce Clause issues for fuller consideration in the first instance by the court of appeals, we address those issues briefly, in case the Court decides to resolve them itself.

Perhaps the most important point to recognize is that Commerce Clause analysis looks beyond the surface of a scheme of taxes or fees. This Court will sustain a state tax against a Commerce Clause challenge only if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). In addition, a fee levied directly upon the users of a state facility must not be "excessive in comparison with the governmental benefit conferred." *Evansville*, 405 U.S. at 716-717; see also *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 621-623 & n.12 (1982). Of particular importance to ATA is the potential for a State to use a complex, facially neutral user fee scheme to shift the costs of transportation-related facilities or services – whether airports or highways or hazardous waste cleanup activities – disproportionately from in-state to out-of-state users. Accordingly we confine our analysis to the discrimination issue, and express no opinion on the ultimate merits of the Airlines' case.[8]

A user fee "discriminat[es] against interstate commerce" if the fee allocates the recovery of facility costs in such a manner that a class of predominantly interstate users is charged at a higher rate (judged in proportion to services provided) than a class of predominantly in-state users. This analysis simply transfers to the analysis of transportation facility user fees the principles that guided this Court in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984) (tax exemption applied only to beverages made almost exclusively in-state), and *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22-26, 31 & n.15 (1990) (preferential tax reduction for commodities "commonly grown in Florida").

The inquiry made in *Bacchus* and confirmed in *McKesson* merely brought up to date this Court's long-held view that "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455 (1940). A state or local enactment that on its face treats intrastate and interstate parties equally nevertheless may fall afoul of the Commerce Clause if its "actual effect * * * is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language." *Id.* at 457. Over the years, this Court increasingly has emphasized the "practi-

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[8] In particular, we do not know whether commercial flights from Grand Rapids actually are so much more likely than private flights to be interstate that discrimination in favor of general aviation amounts to discrimination against interstate commerce. Cf. *Indianapolis Airport Authority* v. *American Airlines, Inc.*, 733 F.2d 1262, 1271 (7th Cir. 1984) ("flights by private planes are more likely to be intrastate than airline flights are"). In addition, to determine whether the fee scheme discriminates in violation of the Commerce Clause would require extensive analysis of the similarities and distinctions between the two forms of aviation.

cal effect" and the "economic realities" of state assessments over the "formal language of the tax statute." *Complete Auto*, 430 U.S. at 279.

Within a formally neutral statute, a State might separate users of a transportation facility into classes that are defined so that certain classes are composed predominantly of in-state users, while in other classes out-of-state users predominate, and accord differential treatment to these two classes. By according differential treatment to classes that use the facility in the same way, a State may violate the Commerce Clause even though within each defined class in-state and out-of-state users are treated equally. The result of such differential treatment is that, on the whole, local users of the facility pay less than interstate users, contrary to this Court's admonition that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within a State." *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984). Under such a scheme, a differential fee also may impose an undue burden on interstate commerce if out-of-state users pay disproportionately for the costs they incur or the benefits they derive within the State.

We do not mean to suggest that every disparity between the in-state and out-of-state composition of differently-taxed classes rises to the level of a Commerce Clause violation. The classes, of course, must consist of comparable persons or businesses, and the disparity in their composition must be substantial. A factually intensive inquiry is necessary in order to establish the threshold beyond which classes of users may be identified with in-state or out-of-state interests. That inquiry is by no means unmanageable, as is revealed by the experience of the courts in adjudicating claims of this kind.[9]

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[9] *Bacchus*, 468 U.S. 263 (favored class had virtually no out-of-state members); *McKesson*, 496 U.S. at 31 (favored classes of (continued...)

In *Evansville*, the Court addressed the challenged head tax in isolation, finding no discrimination because "both interstate and intrastate flights are subject to the same charges." 405 U.S. at 717. The Court apparently did not have before it – and certainly did not address – the argument that the head tax involved the kind of gerrymandering of an assessment scheme to protect local interests that later was struck down in *Bacchus* and *McKesson*.

In this case, because general aviation is charged only 20% of its airside costs, it effectively receives a subsidy from the Airport's concessions profits. If the Airlines are correct, not only is intrastate aviation subsidized at the indirect expense of interstate aviation, but the scheme creates an incentive for the Airport to allocate costs to the Airlines, from which the Airport recovers all allocated costs through fees, as opposed to general aviation, from which the Airport recovers only 20% of allocated costs.[10] *If* indeed general aviation at Kent County International Airport is identifiably intrastate in character, and *if* commercial aviation, by contrast, is identifiably interstate, and *if* the two are sufficiently comparable so that the Commerce Clause forbids discrimination between them, then the constitutionality of the Airport's fee scheme

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[9] (...continued)
fruits disproportionately "adapted to growing" in Florida) (approving relevant analysis in *Division of Alcoholic Beverages & Tobacco* v. *McKesson Corp.*, 524 So. 2d 1000 (Fla. 1988)); *Russell Stewart Oil Co.* v. *Illinois*, 529 N.E.2d 484 (Ill. 1988) (tax preference covered 99.4% of local production but only 88% of out-of-state production); *Dayton Power & Light Co.* v. *Lindley*, 391 N.E.2d 716 (Ohio 1979) (of coal used and taxed in State, 80% of the favored class, but only 6% of the disfavored class, produced in-state).

[10] The Airport's allocation of all crash, fire, and rescue costs to the Airlines (thus allowing general aviation a free ride) may reflect this incentive.

may be seriously in doubt. The resolution of those defining issues, we respectfully suggest, requires properly focused factual development in the district court.[11]

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[11] If the Court turns to the question whether a user fee is "excessive in comparison with the governmental benefit conferred," the economic realities that affect the state owner of a transportation facility come to the foreground. If the State derives collateral revenue as a result of a facility's use – whether through airport concessions income or through a federal highway subsidy – those benefits to the state should be offset proportionately against any costs allocated to interstate users. A State cannot simply use the extra revenue to reduce in-state user fees without reducing the fees charged out-of-state users, and then claim that the out-of-state users were paying only the costs allocated to them. Because the effect of the subsidy would be to reduce the actual costs incurred by all users alike, to continue to recoup the unreduced costs from out-of-state users would result in a charge that was "manifestly disproportionate," and therefore excessive. See *Commonwealth Edison*, 453 U.S. at 621-623 & n.12 (quoting *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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